Supreme Court, U.S.
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No. 97-1568

In The

Supreme Court of the United States

October Term, 1997

ROBERT and ANN CLYNES, as Parents and Next Friends of Nicholas Clynes,

Petitioners,

v.

FT. ZUMWALT SCHOOL DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITIONERS' QUESTIONS PRESENTED

The Questions Presented by Petitioners do not accurately reflect the issues in this case. Specifically, Petitioners overstate the issues in hopes of creating some reason for this Court to grant review. Concisely stated, the only issues properly raised in this case are as follows:

I. Whether the Eighth Circuit articulated and applied the appropriate legal standard in determining that Ft. Zumwalt was providing Nicholas a free appropriate public education;

II. Whether the Eighth Circuit afforded the appropriate level of deference to the district court below; and

III. Whether the Eighth Circuit granted the appropriate levels of deference to the due process hearing panel and the State Level Review Officer.

TABLE OF CONTENTS

Page

RESPONSE TO PETITIONERS' QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. NATURE OF THE CASE AND PROCEDURAL BACKGROUND 1

B. STATEMENT OF FACTS 3

REASONS FOR DENYING WRIT 15

I. THE CLYNES' ATTEMPT TO SEEK THIS COURT'S REVIEW IS JURISDICTIONALLY BARRED 15

II. THE CLYNES HAVE FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI UNDER THE SUPREME COURT'S RULES 17

A. THIS CASE DOES NOT INVOLVE A SPLIT OF AUTHORITY AMONG THE CIRCUITS 17

B. ABSENT A SPLIT OF AUTHORITY AMONG THE CIRCUITS, THERE EXISTS NO REASON FOR THIS COURT TO GRANT THE CLYNES' PETITION 26

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Bingler v. Johnson, 394 U.S. 741 (1969) 18

Board of Educ. v. Rowley, 458 U.S. 176 (1982) ... *passim*

Braxton v. United States, 500 U.S. 344 (1991) 18

Butz v. Glover Livestock Comm'n Co., 411 U.S. 182 (1973) 27

Jaffee v. Redmond, 518 U.S. 1 (1996) 18

M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389 (3rd Cir. 1995) 21

Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114 (2nd Cir. 1996) 20, 21

State v. O'Malley, 383 U.S. 627 (1966) 18

STATUTES

20 U.S.C. § 1401(a)(18) 19

20 U.S.C. § 1412(1) 19

20 U.S.C. § 1415 et seq. 19

20 U.S.C. § 1415(e)(2) 2, 24

Mo. Rev. Stat. § 162.961 1

Mo. Rev. Stat. § 162.962 2

RULES

Sup. Ct. R. 10 ..... 17, 18, 26

Sup. Ct. R. 13 ..... 16, 17

Sup. Ct. R. 33 15

Sup. Ct. R. 34 15

STATEMENT OF THE CASE

A. NATURE OF THE CASE AND PROCEDURAL BACKGROUND

Petitioners Robert and Ann Clynes ("the Clynes" or "the Parents"), as parents and next friends of Nicholas Clynes ("Nicholas"), attempt to appeal from the Eighth Circuit's decision reversing the District Court's opinion below and holding that Respondent Fort Zumwalt School District ("Ft. Zumwalt"or "District") was not legally obligated to reimburse the Clynes for Nicholas' education at the Churchill private school. The key issue on appeal to the Eighth Circuit was whether Nicholas Clynes was offered a free appropriate public education by Ft. Zumwalt for the 1991-92 and 1992-93 school years.

On February 1, 1993, a special education due process hearing was held pursuant to RSMo. § 162.961 at the request of the Clynes. [App. 22][1]. At the hearing, Mr. and Mrs. Clynes requested that the panel review the appropriateness of the educational placements proposed by the District for the 1991-92 and 1992-93 school years and award them tuition reimbursement for those two school years for their unilateral placement of Nicholas at Churchill School, a private school for learning disabled children located in St. Louis County, Missouri. [App. 10 *et seq.*]. A record of the due process hearing was made and the transcript and exhibits were included in the record

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[1] Consistent with the Petition for A Writ of Certiorari, cites to "App." refer to the Appendix filed in the Eighth Circuit. Likewise, cites to "Pet. App." refer to the appendix filed with the Petition to this Court.

before the State Level Review Officer and the District Court and are included in the record and Appendix before this Court. [*See* App. 364 *et seq.*]. After due deliberation, the hearing panel, in a 2-1 decision, ruled in favor of the District. [App. 13].

The Clynes appealed the hearing panel's decision to a State Level Review Officer ("SLRO"), pursuant to RSMo. § 162.962 (1995). [App. 22]. On or about June 29, 1993, the SLRO reversed the decision of the Panel and awarded the Clynes reimbursement for the 1992-93 school year and for a portion of the 1992-93 school year. [App. 22-36]. The District timely appealed to the District Court pursuant to 20 U.S.C. § 1415(e)(2). [App. 1]. The Clynes cross-appealed and filed a counter-claim. [App. 37]. On or about October 11, 1994, the District Court dismissed the Clynes' counterclaim. [App. 105]. On or about November 11, 1995, the District Court conducted a bench trial at which the parties were permitted to present limited additional evidence. [App. 115-225]. On or about May 1, 1996, the District Court entered its judgment and order in which it concluded that the Clynes were entitled to reimbursement. [App. 322-56]. The District timely appealed to the United States Court of Appeals for the Eighth Circuit on May 22, 1996. [App. 357]. The Clynes filed a cross-appeal on May 24, 1996. [App. 361]. On or about July 10, 1997, the Eighth Circuit reversed the District Court and held that the Clynes were not entitled to tuition reimbursement for their unilateral placement of Nicholas at the Churchill School. [Pet. App. 67].

B. STATEMENT OF FACTS

Nicholas is an adolescent male student who was born March 24, 1981. [App. 11, 323]. Nicholas began his academic career with Ft. Zumwalt at the beginning of the 1986-87 school year. [App. 11, 323]. Nicholas' Kindergarten teacher immediately noticed that Nicholas was delayed and referred him for an evaluation for a possible learning disability. [App. 383-85]. In March 1987, the Clynes consented to an evaluation. [App. 710].

As part of the evaluation, the District administered the WISC-R on May 5, 1987. Nicholas' resulting full scale IQ was 112, placing him in the normal range of intelligence. [App. 716]. The evaluation summary prepared by the District in May 1987 indicates that Nicholas displayed inconsistency in the classroom and tended to give up when things became difficult. [App. 714]. Significantly, the evaluation summary also recognizes that Nicholas' reading and math scores were delayed, falling more than one year below his current chronological age. [App. 387-88, 714, 718].

Upon completion of the testing, the District held a staffing in May 1987, at which time Nicholas was diagnosed as having a learning disability in the areas of math and reading. [App. 718, 721]. District personnel met with the parents in May 1987 to develop an Individualized Educational Plan ("IEP") for Nicholas. [App. 721]. The IEP recommends a highly structured, individualized instructional program in the areas of math and reading. [App. 388, 720]. The IEP also recommends that Nicholas' teachers utilize a multi-modal approach to learning with

him and recognizes that "[classroom observations indicate difficulties maintaining on task behavior." [App. 723]. The IEP enumerates goals and objectives in the areas of word attack, alphabetizing, reading and math and calls for 375 minutes per week of individualized special education in the resource room. [App. 724-28].

Also, in May 1987, the District recommended that Nicholas repeat Kindergarten, in part, because Nicholas came to the District without pre-Kindergarten readiness skills and without the level of maturity expected of a kindergarten student. [App. 384, 389]. However, Mrs. Clynes absolutely objected to Nicholas being retained. [App. 389, 674]. The District acquiesced, and Nicholas was placed in the first grade, with support from the learning disabled ("LD") resource room and with a part of each day being initially spent in the kindergarten class. [App. 674-75, 712]. The May 1987 IEP developed for Nicholas was implemented during that year. [App. 390, 721]. At that time, the Clynes did not challenge nor did they seek due process with respect to any portion of the 1987-88 IEP. [App. 670]. Indeed, at hearing, Mrs. Clynes testified that, up until Nicholas' third grade year, she had **no** complaints and **no** reason to complain regarding his educational program. [App. 426].

Once Nicholas was identified as learning disabled and began receiving part of his instruction in the resource room, he received two report cards. [App. 448]. Nicholas would receive a traditional report card from his regular classroom where he was graded against an absolute norm – *i.e*, his classroom performance was compared to that of other children in the class. [App. 448]. Nicholas also received a detailed, narrative report card from his

resource teacher that notes Nicholas' individual progress in relation to the IEP goals and objectives developed for him. [App. 447-48, 456, 659-60].

During the 1987-88 school year, Nicholas' special education teacher worked closely with his regular first grade teacher to provide Nicholas with an appropriate education and frequently visited the regular classroom. [App. 677, 683]. Moreover, consistent with Mrs. Clynes' testimony that she had no complaints regarding Nicholas' education until his third grade year, Nicholas made progress on his IEP goals and objectives. [App. 677, 732-32A]. As indicated in Nicholas' resource room narrative progress reports, he had many areas that needed improvement, but his resource teacher "saw such success with him that year in developing the readiness skills, and [she] thought that he was pretty proud of that." [App. 684]. Moreover, the special education teacher noted in Nicholas' report card that "[h]e has made tremendous academic gains already," having mastered 120 of the Dolch sight reading words and his beginning initial consonant sounds and was therefore ready to begin "attack on sight words." [App. 732]. In spite of his learning disabilities and behavioral problems, Nicholas' regular classroom report card for the 1987-88 year reflects that Nicholas was reading, at that time, on grade level and receiving passing grades in the regular classroom. [App. 1061-62]. During the 1987-88 school year, the District sent the Clynes notification of the District's intent to increase Nicholas' time in the LD resource room. [App. 390, 677, 730]. Because spelling had become an area of concern, Nicholas' time in the LD resource room was increased from 375 minutes per week to 525 minutes per week in

order that the special education teacher would continue to have sufficient time to devote to the reading and math goals and objectives in Nicholas' IEP. [App. 677, 730].

In the May 1988 staffing held for Nicholas, the report prepared by Nicholas' IEP team noted that he had experienced "great academic success" during 1987-88. [App. 733]. However, because Nicholas' performance had declined during the last few weeks of school and because his teachers noted heightened concerns regarding his behavior and distractibility, the District, consistent with its earlier recommendation to retain Nicholas in Kindergarten, recommended that he be retained in first grade, and he was. [App. 397-98, 731, 733].

The IEP developed for Nicholas for the 1988-89 school year indicates that, although "achievement testing and classroom performance reveal much academic growth, especially in the areas of reading and spelling," Nicholas continues to show a significant discrepancy between achievement and ability in reading, spelling and math. [App. 736]. The IEP contains goals and objectives in the areas of math, spelling, reading and phonics and calls for a total of 375 minutes per week of individualized instruction in the special education room. [App. 736-41]. Moreover, the IEP notes that the "method of choice for reading instruction centers around the combination of a language experience approach and a wholistic, sight word approach." [App. 736]. Further, the IEP calls for an intervention system to deal with Nicholas' behavior and provides opportunities for peer tutoring as a positive reinforcement technique. [App. 736]. Nicholas' special education teacher testified that the resource room time

was decreased somewhat based on "Nick's performance and success level" at that time. [App. 680].

During the 1988-89 school year, the year during which Nicholas repeated the first grade, his LD resource teacher was Karla Ruhr. [App. 644]. Nicholas' regular report card for the year shows that Nicholas was receiving passing grades in all subject areas and was reading at grade level. [App. 397-98, 903, 1059-60]. Nicholas' resource room narrative report also details the progress on his IEP goals and objectives. [App. 749-50]. Although Nicholas made sufficient progress to be promoted to second grade at the conclusion of the 1988-89 school year, his teachers noted that he needed improvement in several areas, particularly math and reading. [App. 749-50, 1059-60].

In accordance with federal and state law, Nicholas was re-evaluated at the beginning of the 1989-90 school year and continued to be diagnosed as learning disabled. [App. 751-52]. The re-evaluation summary indicates that "Nicholas is experiencing difficulty in the reading, spelling and math areas . . . His behavior difficulties still seem to directly affect his relationship with others and his performance in the classroom setting." [App. 771]. In the summary, the team notes that modified seating arrangements and peer grouping had been used with some success for dealing with inappropriate behaviors. [App. 771]. The evaluation summary also states that, consistent with his disability, Nicholas' greatest area of difficulty in reading was with word attack skills on which he tested below grade level. [App. 772]. Testing showed, however, that Nicholas was at grade level in math computation and concepts. [App. 771]. The IEP developed for Nicholas in

May 1989 (for the 1989-90 year) requires resource time of 300 minutes per week. [App. 748]. That IEP notes, that although "Nick is easily frustrated and needs much positive reinforcement and praise," the "[a]chievement testing and classroom performance reveal much growth during the current school year." [App. 744]. Once again, the IEP contains appropriate goals and objectives in the areas of math, written language, reading, phonics, punctuation and capitalization [App. 745-48].

Nicholas' second grade report card shows that, although he needed improvement in many areas, he was receiving passing marks in all subjects and was reading on a second grade level. [App. 1057-58]. Karla Ruhr continued to be Nicholas' LD resource teacher during the 1989-90 and 1990-91 school years – Nicholas' second and third grade years, respectively. [App. 645]. Ms. Ruhr testified that she communicated frequently with Nicholas' regular classroom teachers during this time and that they discussed, among other things, the ways in which his IEPs could be implemented. [App. 645]. In addition, Ms. Ruhr noted that she went into the regular classrooms to observe Nicholas' regular classroom teachers working with him. [App. 647]. Ms. Ruhr also testified that, at the beginning of Nicholas' second grade year, his appropriate instructional level was at the second grade. [App. 667, 903].

The IEP developed for Nicholas' third grade year (1990-91) authorizes 225 minutes in the resource room, a decrease from previous years. [App. 791]. Mrs. Clynes and the District's witness testified that one of the reasons for decreasing resource room time, in addition to Nicholas' level of performance, was to increase his self-

esteem. [406, 465, 625, 263]. The third grade IEP contains goals and objectives for individualized instruction in the areas of reading, written language, math, word recognition and comprehension, and spelling. [App. 786-90]. Although the IEP indicates that a sight word approach to reading is the method of choice, [App. 785] and does not contain a specific word attack objective, Nicholas' resource room progress reports illustrate that Ms. Ruhr consistently worked with him on word attack skills. [App. 796-96].

By the end of the third grade, Nicholas was reading at the third grade/second semester level. [App. 444, 659, 670, 799, 903]. Mrs. Clynes testified at the hearing that, with respect to his regular classroom performance in the areas of his disability, Nicholas was receiving predominantly passing grades. [App. 407].

Although Nicholas was reading at grade level at the end of the third grade [App. 670], the Clynes decided to enroll him for the summer in Churchill School, a private school for learning disabled students. [App. 411, 452, 498]. All students at Churchill have been diagnosed as being children with disabilities. [App. 498, 540]. Thus, there is no opportunity at Churchill for Nicholas to be educated with nondisabled peers. Sometime before May 13, 1991, the Clynes applied to have Nicholas enrolled for the Summer 1991 session. [App. 411, 452]. When the Clynes were notified that Nicholas was accepted at Churchill for the summer, Churchill also informed them that Nicholas was not accepted for the fall because there was a waiting list. [App. 430-31, 513].

On or about May 29, 1991, Churchill conducted a pre-reading test of Nicholas' abilities. [App. 1193]. According to Mrs. Clynes' testimony, the time at which Churchill tested Nicholas (the fourth quarter of the school year), is considered to be the time of Nicholas' worst performance. [App. 401]. Indeed, the Churchill testing examiner noted Nicholas' uncooperative attitude during this testing, writing that "Nick was very controlling at the beginning; wouldn't work, had a *bad* attitude – totally negative." [App. 1193 (emphasis in original)]. Moreover, the tests administered by Churchill, although standardized in that they use a controlled population, do not generate standard scores and, thus, cannot be compared to other tests, such as the ones used by the District. [App. 150, 551, 587, 1214]. The testing consisted of, among other things, requiring Nicholas to use a phonics approach to word decoding and asking Nicholas to sound out nonsense words. [App. 587]. Phonics and word attack has always been a weakness for Nicholas, and using nonsense words with Nicholas was not appropriate. [App. 562, 588-89, 650-51]. In spite of this, the testing showed that Nicholas' word attack skills were below grade level (consistent with past Fort Zumwalt testing), but indicated that his reading and sight word skills were "nearer his grade placement of third grade." [App. 1218]. Churchill, using this non-standardized, informal assessment, placed Nicholas' reading ability at the pre-primer level and based its programming for Nicholas on that testing, rather than on his previously demonstrated reading level of third grade. [App. 297, 564, 668, 903].

In the meantime, the District met with the Clynes on May 28, 1991 – after the Clynes had applied to Churchill –

to develop an IEP for Nicholas for the 1991-92 school year. [App. 800-01]. Mrs. Clynes testified that she was well aware of her procedural due process rights at the time and was fully involved in the development of the IEP. [App. 426]. That IEP calls for 300 minutes of resource room time in word recognition and comprehension, written language, math, spelling and word attack. [App. 803-14]. Mr. and Mrs. Clynes specifically requested that the IEP team review the IEP in the fall in order that information from Nicholas' summer at Churchill could be utilized. [App. 431, 503]. The IEP team agreed to do so and the IEP specifically noted that it was to be reviewed in September 1991. [App. 623, 802]. Although the Clynes expressed some dissatisfaction with Nicholas' progress at that meeting, they did not request a change in placement to Churchill. [App. 475-76, 670]. Moreover, while the Clynes testified extensively about what they perceived as a negative attitude expressed by District personnel at that meeting, [App. 432-33], Mr. Clynes also conceded that no one from the District ever stated that they could not provide Nicholas with an appropriate education in the District. [App. 517]. The Clynes did not request due process regarding the May 1991 IEP. [App. 670].

On June 25, 1991, Churchill notified the Clynes that they had no opening for Nicholas in the 1991-92 program. [App. 816]. However, a full-time opening became available for Nicholas at Churchill sometime later in the summer. [App. 514, 1121]. On August 29, 1991, Mrs. Clynes wrote to Hawthorn's principal, Mrs. Wiig, to inform her that an opening had become available and that the Clynes were going to send Nicholas to Churchill for the 1991-92 year, but did not request reimbursement or a change of

placement. [App. 817]. Thus, Nicholas did not return to Ft. Zumwalt and the District never had an opportunity to implement the 1991-92 IEP. [App. 659]. Rather, Nicholas began attending Churchill as a full-time, regular student in the fall of 1991. [App. 479-80, 1121].

In August 1992, Mrs. Clynes wrote to Dr. Dubray, the Ft. Zumwalt Superintendent, and expressed their pleasure with Nicholas' performance that summer at Churchill. [App. 846]. Although Mrs. Clynes expressed some criticism of the District's educational programming for Nicholas, she did not request a change of placement for Nicholas to Churchill nor did she request reimbursement. Dr. Dubray responded to Mrs. Clynes' letter on August 18, 1991 and noted his concern at the Clynes' disappointment. [App. 850]. In that letter, Dr. Dubray notified the Clynes of their right to due process, but suggested that they meet with him to discuss and resolve their concerns. [App. 850]. The Clynes met with the District on August 31, 1991. [App. 851].

The District re-evaluated Nicholas in late summer of 1992. [App. 818, 852]. As part of the re-evaluation and the development of an IEP for the 1992-93 school year, the District solicited information from Nicholas' teachers at Churchill. [App. 820-45]. Some of Nicholas' Churchill teachers had positive things to say about his performance and attitude. [App. 820, 833, 837, 839]. However, his teachers also noted that Nicholas talked out, got angry when learning new material, rushed through his work and worked inconsistently. [App. 829-30]. One teacher also indicated that less than 25 percent of Nicholas' work was acceptable. [App. 832]. Based upon the re-evaluation, the District held several staffing and IEP conferences to

develop a 1992-93 IEP for Nicholas. [App. 864, 867, 869, 871, 875]. Churchill staff provided significant input. [App. 865, 867-68, 870].

The present level of performance section of the 1992-93 IEP was based on the Churchill staff's assessment as well as the re-evaluation. [App. 877-78]. The IEP contains goals and objectives in word attack, vocabulary, comprehension, math, written expression and study skills and calls for Nicholas to be in a self-contained LD classroom at Hawthorn School for the majority of the school day. [App. 876, 892]. A self-contained classroom is called for where the student needs to spend in excess of three hours per day in a specialized setting for instruction and such a placement is generated by the IEP goals and objectives and the time necessary to implement those goals and objectives. [App. 621-622]. Pursuant to the 1992-93 IEP, Nicholas was to be mainstreamed for such classes as art, music, and physical education. [App. 892]. The Clynes disagreed with the educational placement proposed by the District in the 1992-93 IEP and for the first time, on November 5, 1992, requested a three-person due process hearing with respect to the issue of Nicholas' proposed placement. [App. 902].

On or about February 10, 1993, the two-member majority of the panel issued its decision in favor of the District. [App. 10]. In its written decision, the panel correctly noted that the issue for hearing was the appropriateness of the District's proposed placement as well as the appropriateness of the Churchill placement. [App. 10]. In its findings of fact, the majority concluded that Nicholas made progress at Hawthorn prior to his removal and cited to evidence supporting that conclusion. [App.

11]. The majority further found that, although Nicholas was making progress at Churchill, he was having difficulties there. [App. 12]. More specifically, the majority concluded, based on Ms. Clemens' testimony, that the District could provide an appropriate educational program for Nicholas. [App. 14]. Based on its finding that Nicholas made progress at Hawthorn, the Panel rejected the Clynes' contention that Nicholas was regressing while a student in the District and reasoned that, although Nicholas had some difficulties, his regular classroom report cards, his special education progress notes and a report from a private therapist all indicated that he was making progress. [App. 13].

On or about June 29, 1993, the State Level Review Officer overturned the Panel's decision and awarded reimbursement to the Clynes for the 1991-92 school year. [App. 35]. In addition, the SLRO concluded that the evidence established that the 1992-93 IEP showed that the "District was ready, willing and able to provide to Nicholas anything that Churchill School had to offer." [App. 35]. Consequently, the SLRO reasoned that, because that IEP was not prepared until October 1992, the parents would be entitled to reimbursement through the end of October "unless they can demonstrate that they were required to prepay, without a right of refund, Churchill School tuition through a longer period." [App. 35].

The District appealed the SLRO's decision to the District Court. [App. 1]. On November 16, 1996, the District Court conducted a bench trial for the purpose of hearing limited additional evidence. [App. 115].

On May 1, 1996, the District Court issued an Order awarding reimbursement to the Clynes for the 1991-92 and 1992-93 school years. [Pet. App. 51]. On July 10, 1997, the Court of Appeals for the Eighth Circuit reversed and held that the Clynes were not entitled to reimbursement. [Pet. App. 67].

REASONS FOR DENYING WRIT

I. THE CLYNES' ATTEMPT TO SEEK THIS COURT'S REVIEW IS JURISDICTIONALLY BARRED.

The Clynes submitted their original Petition for Writ of Certiorari ("First Petition") to this Court postmarked December 26, 1997. (First Petition lodged with this Court on or about April 20, 1997). The Office of the Clerk received this First Petition on December 29, 1997. However, the Clerk discarded the First Petition because it failed to comply with Supreme Court Rules 33 and 34, which require at least a 3/4 inch margin on all sides and that the order of the district court be included in the appendix, respectively. *See* Letter from William K. Suter, Clerk of the Court, to Michael Hillel Finkelstein, Counsel for Petitioners (Jan. 23, 1998) (letter lodged with this Court by Respondent on or about April 20, 1997).

The Clerk directed the Clynes to correct the deficiencies in the First Petition and to submit their corrected petition and appendix within 60 days. *Id.* The Clynes complied by submitting their Petition for A Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit ("Petition") on March 20, 1998. However,

the Petition did not merely correct the deficiencies contained in the First Petition. Rather, the Clynes utilized the additional sixty days to **rewrite and revise** their petition. For example, the Clynes deleted an entire fourth Question Presented for Review from the First Petition. The Clynes are not permitted to utilize this additional time as an extension of the period allowed in which to timely file their Petition. For this reason, their Petition must be denied for lack of jurisdiction.

Supreme Court Rule 13 allows a party 90 days from the date of the entry of judgment in which to file a petition for a writ of certiorari to review that judgment. Sup. Ct. R. 13.1. If a party timely files a petition for rehearing in the lower court, the time to file the petition for a writ of certiorari runs from the date of the denial of the petition for rehearing. Sup. Ct. R. 13.2.

In this case, the Clynes filed a petition for rehearing that was denied by the Eighth Circuit on September 30, 1997. Under Rule 13.2, the Clynes then had 90 days from that date in which to submit their petition. After using the additional sixty days granted by the Clerk to rewrite and revise their petition, the Clynes submitted their Petition on March 20, 1998, a total of 171 days after the Eighth Circuit denied the Clynes' Petition for Rehearing.

The Clynes' use of the additional 60 days to rewrite and revise their Petition clearly violates Rule 13. This violation resulted in the submission of this Petition for Writ of Certiorari 171 days after the denial of the Clynes' Petition for Rehearing. By revising their petition, the Clynes have, in effect, circumvented Supreme Court Rule 13. Thus, this Petition was **not** timely filed in accordance

with Supreme Court Rule 13, and for this reason, this Court lacks jurisdiction. Accordingly, certiorari must be denied.

II. THE CLYNES HAVE FAILED TO ESTABLISH SUFFICIENT GROUNDS FOR CERTIORARI UNDER THE SUPREME COURT'S RULES.

Even if they had timely filed their Petition for Writ of Certiorari, the Clynes patently have failed to demonstrate that this case is exceptional such that it merits the review of the Supreme Court. Supreme Court Rule 10 states that, "[a] petition for a writ of certiorari will be granted only for compelling reasons." Rule 10 further sets forth those circumstances under which certiorari may be proper. *Id.* Not only have the Clynes failed to identify any such circumstances in support of their request for certiorari, they also have failed to set forth any compelling reasons that militate in favor of the granting of certiorari. Indeed, the Clynes merely point to phantom splits of authority among the circuit courts of appeals and hint at important questions of federal law that have not yet been decided by this Court. However, neither of these two circumstances truly exists in this case.

A. This Case Does Not Involve a Split of Authority Among the Circuits.

The Clynes' arguments that this case involves a split of authority among the United States courts of appeals are erroneous. Under Supreme Court Rule 10, certiorari may be considered where "a United States court of

appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a).

The type of conflict required between circuit courts in order to warrant certiorari is a **direct** conflict regarding a specific issue of law. *See, e.g., Jaffee v. Redmond,* 518 U.S. 1 (1996) (certiorari granted to resolve conflict between several Circuits regarding whether federal courts should recognize a psychotherapist-patient privilege under the Federal Rules of Evidence); *Bingler v. Johnson,* 394 U.S. 741, 747-48 (1969) (certiorari granted to resolve conflict between Third Circuit's ruling and ruling by the Fifth Circuit regarding validity of a treasury regulation); *United States v. O'Malley,* 383 U.S. 627, 630-31 (1966) (certiorari granted to resolve conflict between Seventh Circuit's decision and a previous ruling by the First Circuit regarding whether to exclude from a taxable estate the portion of the trust principal representing accumulated income and order an appropriate refund); *Braxton v. United States,* 500 U.S. 344, 347 (1991) (certiorari granted to resolve conflict between the Fourth Circuit's decision below and that of the Second and Fifth Circuits regarding whether a "stipulation" in a plea agreement must be part of the "quid pro quo" for the government's agreement not to charge a higher offense). This case simply does not present any decision by the Eighth Circuit that is in direct (or even indirect) conflict with any other circuit on the specific issues involved.

1. The Eighth Circuit articulated and applied the proper standard in determining that Ft. Zumwalt was providing Nicholas a free appropriate public education.

Under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. § 1415 *et seq.*), states are required to provide disabled students with a "free appropriate public education" ("FAPE"). 20 U.S.C. § 1412(1). The IDEA then provides:

> A "free appropriate public education" is defined as: special education and related services that –
>
> (A) have been provided at public expense, under public supervision and direction, and without charge,
>
> (B) meet the standards of the State administrative agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved,
>
> (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18).

In *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), this Court established the appropriate standard to be used by lower courts in determining whether FAPE was being provided. The Court stated:

> [I]f personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the checklist are satisfied, the

> child is receiving a "free appropriate public education"as defined by the Act.

Id. at 189. The Court further stated that the IDEA does not require schools to furnish "every special service necessary to maximize each handicapped child's potential." *Id.* at 199.

In this case, the Eighth Circuit applied the standard set forth in *Rowley* and determined that Ft. Zumwalt had provided Nicholas FAPE. The Eighth Circuit's opinion cites directly and repeatedly to *Rowley* in stating the appropriate standard for determining FAPE. [Pet. App. 58-59]. There is no evidence that in the present case, the Eighth Circuit applied any standard different from that set forth by this Court.

The Clynes point to cases from other circuits in an attempt to establish a split of authority among the circuits regarding the appropriate standard for determining FAPE. However, both cases cited by the Clynes apply the exact same standard used by the Eighth Circuit in this case.

First, the Clynes cite to *Mrs. B. v. Milford Bd. Of Educ.*, 103 F.3d 1114 (2nd Cir. 1996), for the proposition that the standard created by this Court in *Rowley* requires more than "mere trivial advancement." [Pet. 15]. The Eighth Circuit did not disagree. Rather, the Eighth Circuit relied on language from *Rowley* stating that although simply advancing from grade to grade does not evidence FAPE, grades and advancement from grade to grade are "important factors" in determining FAPE. [Pet. App. 62-63 (citing *Rowley*, 458 U.S. at 203 & n.25)].

Second, the Clynes cite to the Third Circuit's decision in *M.C. v. Central Reg'l Sch. Dist.*, 81 F.3d 389, 393 (3rd Cir. 1995), for the proposition that a de minimis educational benefit is insufficient to meet the *Rowley* standard. [Pet. 17]. Once again, the Eighth Circuit has never stated otherwise. However, the Eighth Circuit did emphasize in its decision below that although the IDEA requires school districts to offer educational benefits to disabled students, the Act does not require school districts to obtain maximum results for such students. [Pet. App. 62 (citing *Rowley*, 458 U.S. at 203)]. As this Court reasoned in *Rowley*, Congress never intended to impose on school districts a requirement that they maximize a handicapped student's education or achieve goals which in many cases would be impossible. *Id.* at 201 n.23.

Thus, the circuits agree that, under *Rowley*, school districts are required to provide educational programs "reasonably calculated to enable the child to receive educational benefits." *Id.* at 207; *see also Mrs. B.*, 103 F.3d at 1119; *M.C.*, 81 F.3d at 392 (citing *Rowley*, 458 U.S. at 200, stating that school district must provide instruction "sufficient to confer some educational benefit upon the handicapped child"). Further, the circuits agree that this mandate to public school districts is limited. *See Rowley*, 458 U.S. at 201 (IDEA provides "basic floor of opportunity" for disabled students). Simply stated, there is no split of authority among the circuits regarding the proper standard to be used in determining FAPE.

Nevertheless, the Clynes ask the Court to clarify the standard to ensure uniformity of law. However, as this Court has made clear, a more exacting standard or test is impossible. In *Rowley*, this Court stated:

> The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.

Id. at 202.

This Court recognized that the various types and degrees of disabilities covered by the Act preclude the use of a precise and universally applied standard to determine whether individualized educational programs are adequate to meet the demands of the Act. For this reason, this Court specifically limited its decision in *Rowley* to the particular facts of that case. This is the only proper method by which courts can review the decisions of school districts regarding the education of disabled students under the IDEA. A more exacting standard would defeat the very purpose of the IDEA, which is to provide individually tailored instruction to students with vastly different levels of ability.

2. The Eighth Circuit afforded the appropriate level of deference to the district court below.

The Clynes incorrectly argue in their Petition that the Eighth Circuit rejected the clearly erroneous standard in reviewing the District Court's factual findings. [Pet. 24]. Contrary to the Clynes' contentions, the Eighth Circuit did not rest its decision on a finding that the District Court's factual findings were clearly erroneous. Rather, the Eighth Circuit's decision clearly was based on its determination that the District Court reached an erroneous legal conclusion and, in contravention of *Rowley*, substituted its notion of sound educational policy for those of the school authorities it was asked to review. [Pet. App. 63].

Indeed, the Eighth Circuit aptly noted, "whether a school district has offered a free appropriate public education is a mixed question of fact and law and the district court's ultimate determination is reviewed de novo." [Pet. App. 58]. The Eighth Circuit applied this standard and stated that *"after studying the underlying factual findings of the district court in light of the record and legal standards under IDEA,* we conclude that the school district did offer Nicholas a free appropriate public education as required by Congress." [Pet. App. 62 (emphasis added)]. This statement, in and of itself, denotes that the Eighth Circuit panel accepted the District Court's factual findings but, after a de novo review, properly reversed the erroneous legal conclusions drawn from those facts.

The Clynes attempt to create the appearance of a conflict among circuits by citing to cases from other circuits. However, their fact-intensive discussion of these

cases reveals plainly why these cases resulted in different outcomes. The cases are all based on different and unique facts. Indeed, what the Clynes argue is a "lack of uniformity" among the legal standards within the circuits is, in reality, nothing more than the ordinary difference in outcome based on the application of a well settled legal standard to different sets of facts.

3. The Eighth Circuit granted the appropriate levels of deference to the due process hearing panel and the State Level Review Officer.

The Clynes also erroneously contend that the Eighth Circuit erred by not properly deferring to the factual findings of the SLRO. In essence, the Clynes contend that the federal courts must in all but the most egregious cases support the decision of the SLRO. However, the Eighth Circuit articulated and applied the proper level of deference set forth in the IDEA.

Under the IDEA, a court reviewing an administrative determination "shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court deems is appropriate." 20 U.S.C. § 1415(e)(2). The Eighth Circuit noted that this section does not require absolute deference to administrative findings, but instead calls for an independent, modified de novo review that simply gives "due weight" to the state administrative proceedings. [Pet. App. 55 (citing *Rowley*, 458 U.S. at 205-06)]. Moreover, the Eighth Circuit noted this Court's admonition that courts are not to "substitute their own notions of sound educational policy for those of the

school authorities which they review." [Pet. App. 56 (citing *Rowley*, 458 U.S. at 206)].

In this case, the Eighth Circuit majority applied the proper standard of review in concluding that Fort Zumwalt provided FAPE to Nicholas. As previously noted, the Eighth Circuit thoroughly discussed the three-member hearing panel's findings as well as the SLRO's findings and, after engaging in its own independent review and giving "due weight" to both administrative decisions, properly concluded that the Clynes were not entitled to reimbursement. Ironically, the Clynes' argument carried to its logical extreme would lead to a result opposite to that they are seeking. The record demonstrates that the SLRO awarded reimbursement only for the 1991-92 school year and a small portion of the 1992-93 school year. Yet, the Clynes do not ask this Court to give absolute deference to that part of the SLRO's decision. Simply put, the Clynes seek the application of that standard only when it serves their purpose.

The Clynes also argue that the Eighth Circuit erroneously deferred to the findings of the hearing panel and not those of the SLRO. However, there is no evidence in the opinion that the Eighth Circuit overruled any factual findings at either stage of the administrative review. The court merely stated that where the findings of the hearing panel and those of the SLRO are in conflict, "a court may choose to credit the hearing panel's findings based on observations of witnesses and reject the reviewing officer's *analysis* if it does not appear to give sufficient weight to the views of the professional educators." [Pet. App. 56]. This statement is entirely consistent with the

preponderance of the evidence standard and its "due weight" requirement.

In sum, the Eighth Circuit did not fail to give the SLRO proper deference. Rather, the court, pursuant to well-established principles, independently reviewed the record and concluded that Nicholas' IEPs were reasonably calculated to provide educational benefit. This holding was based on the undisputed facts in the record as well as the Eighth Circuit's appropriate adherence to the *Rowley* admonition that courts should not substitute their own notions of educational policy.

B. Absent a Split of Authority Among the Circuits, There Exists No Reason For This Court to Grant the Clynes' Petition.

In light of Supreme Court Rule 10 and its guidelines for determining where certiorari is appropriate, there is no reason for this Court to hear this case absent a split of authority among the circuits. This case presents no split of authority on any issue between the Eighth Circuit and other ciruits, nor does it present any important question of federal law that has not been, but should be, settled by this Court.

Although the Clynes contend that the *Rowley* decision must be further clarified by this Court to avoid its inconsistent application in the circuits, the case law suggests strongly that such clarification is not necessary. As stated above, the circuits are uniformly and consistently applying the correct legal standard to determine whether

FAPE has been provided. Further, the courts are consistently applying proper standards of review both at the district and circuit court levels.

As Justice Stewart once wrote:

> The only remarkable thing about this case is its presence in this Court. For the case involves no more than the application of well-settled principles to a familiar situation, and has little significance except for the [parties].

Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 189 (1973) (dissenting opinion). This admonition is particularly applicable to the present case. This case presents no special or important reason for this Court to accept review under Rule 10.

CONCLUSION

For each of the reasons set forth in the School District's brief, this Court should deny the Clynes' Petition for Writ of Certiorari.

Respectfully submitted,

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